UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

P.J. ROSALY ENTERPRISES, INC. d/b/a ISLANDWIDE EXPRESS And UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	Cases 12-CA-218464 12-CA-219677 12-CA-221809 12-CA-229342 12-CA-229361 12-CA-229599

IWE'S MOTION FOR JUDICIAL NOTICE

TO THE HONORABLE ADMINISTRATIVE JUDGE;

P.J. ROSALY ENTERPRISES INC., a/k/a Islandwide Express ("IWE") through their legal representatives and very respectfully requests to take judicial notice pursuant to Rule 102 of the Federal Rule of Evidence of the following adjudicative facts and decision issued by the Federal Bankruptcy Courts in In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690:

I. INTRODUCTION

Rule 201of the Federal Rules of Evidence allows a court or judge to judicially notice of an adjudicative fact that is not subject to reasonable dispute because it:

(1) Is generally known with the trial court's territorial jurisdiction; or

(2) Can be accurately and readily determined from sources whose accuracy cannot reasonable be questioned.

Rule 201 allows a court to take judicial notice at any time of the proceedings on its own or if a party requests it and the court is supplied with the necessary information.

Based on the right confer by Rule 201 we hereby request Judicial Notice be taken of the following adjudicative facts in support of IWE's arguments and defenses related to the Second Consolidated Complaint in the referred to charges. This is a

unique case. It is seldom a bankruptcy court rejects a collective bargaining agreement under section 1113 of the Federal Bankruptcy Code as it did in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690. Therefore, because the rejection of the CBA and Stipulation mentioned in paragraph 5 (c) of the Second Consolidated Complaint is an undisputed adjudicative fact, essential to the controversies of this case, Judicial Notice must be taken of the following decision issued by the Federal Bankruptcy Court for the District of Puerto Rico and the First Circuit Bankruptcy Appellate Panel regarding the allegations included in the Second Consolidated Complaint and IWE's Answer to the Second Consolidated Complaint.

II. ADJUDICATIVE FACTS AND COURT ORDERS IWE REQUEST JUDICIAL NOTICE BE TAKEN:

1. **Exhibit 1 - Opinion and Order issued by the Federal Bankruptcy Court for the District of Puerto Rico on December 7, 2017:**

a. This judicial decision support IWE's position that the Federal Bankruptcy Court for the District of Puerto Rico rejected the totality of the collective bargaining agreement and Stipulation mentioned in paragraph 5 of the Second Consolidated Complaint.

b. In its Opinion and Order the Federal Bankruptcy Court established the following undisputed FACT: "The *Collective Bargaining Agreement* sign on 2012, in conjunction with the Stipulation signed on August 24, 2016, constitutes the collective bargaining agreement with the Debtor is seeking to reject. The court will refer to this as the "CBA" for purposes of this opinion and order". (pg. 3 (lines 20-22)

c. Upon weighing the requirements of section 11113 of the Federal Bankruptcy Code to reject a collective bargaining agreement, the federal bankruptcy court concluded the following: "The court finds, based on the evidence before it, that the Debtor has complied with Section 11113's requirements. The Debtor has shown that it satisfied the nine-factor test. Accordingly, Debtor's *Motion Requesting Rejection of the Collective Bargaining Agreement with Union de*

Tronquistas" (Docket No. 152) is hereby granted. **SO, ORDERED**". (pg. 24, lines15-20).

d. The Bankruptcy Court took the action for rejecting the "CBA" based on IWE's *Motion Requesting Rejection of the Collective Bargaining Agreement with Union de Tronquista;* the application of section 1113 of the Federal Bankruptcy Code and the rights and jurisdiction confer by the Federal Bankruptcy Code.

e. The Court also established as a fact that at all times IWE bargain in good faith with the Union the propose modifications to the CBA prior to filing *Motion Requesting Rejection of the Collective Bargaining Agreement with Union de Tronquistas.*

2. **Exhibit 2 - Minute Entry issued by the Federal Bankruptcy Court for the District of Puerto Rico for November 8th & 9th, 2017 Evidentiary Hearing:**

The Minutes of the November 8th and 9th Evidentiary Hearing held before the Federal Bankruptcy Court for the District of Puerto Rico established the facts and adjudications of the court during the hearings regarding IWE's *Motion Requesting the Rejection of the Collective Bargaining Agreement with Union de Tronquistas* filed by IWE and Protective Order also requested by IWE as to the information related to Cardinal and other clients. It supports IWE's answer as to the allegations of paragraphs 5, 6 (b), 9 (a) through (i), 11 and 13 of the Second Consolidated Complaint and IWE's additional affirmative defenses included in its Answer to the Second Consolidated Complaint.

3. **Exhibit 3 - Minute Entry issued by the Federal Bankruptcy Court for the District of Puerto Rico on March 28, 2018:**

This Minute supports the following arguments included by IWE in its Answer to the Second Consolidated Compliant:

a. That the National Labor Relations Board does not have jurisdiction to:

i. Seek to execute any money judgment against IWE included in the Second Consolidated Complaint which includes, but is not limited to:

1. Request the payment of union dues owed, its interest or any

allocation as to said amounts alleged in charge 12-CA-218464 and paragraphs 1 (a); 9(f), (h) and (i) of the Second Consolidated Complaint;

2. request the overtime payments alleged in charge 12-CA-219677 and paragraphs 1(b), 1(c) and 10 (a) and (b) of the Second Consolidated Complaint;

3. request the payment of the June 1, 2018 $0.25 wage increase included in the stipulation as alleged in charge 12-CA-229342 and in the allegations of paragraphs 9(g), (h) and (i) of the Second Consolidated Complaint.

ii. Revoke the court's decision rejecting the totality of the CBA, including the Stipulation.

1. This Minute supports IWE's position that the CBA and Stipulation mention in paragraph 5 of the Second Consolidated Complaint were rejected in its entirety without any qualifications, conditions or exceptions as of December 7, 2017 by the Federal Bankruptcy Court's.
2. It also supports IWE's position that the Court on March 28, 2018 considered and dismissed the argument alleged in paragraph 6 (b) of the Second Consolidated Complaint that the court did not reject the CBA in its entirety, but only certain sections.
3. It confirms IWE's position that as of December 7, 2019 the Stipulation mentioned in paragraphs 5 (c) and 9 (g) of the Second Consolidated Complaint ceased to exist.
4. It supports IWE's position that it had no obligation to pay the June 2018 $0.25 wage increase alleged in charge 12-CA-229342 and paragraphs 9(g), (h) and (i) of the Second Consolidated Complaint since the Stipulation that provided said wage increase ceased to exist as of December 7, 2017.

iii. Order IWE to bargain a new collective bargaining agreement as alleged in paragraphs 10(a) & (b) and 13 of the Second Consolidated Complaint.

b. This Minute also supports IWE's position that the Union, by requesting the court to order IWE to bargain the new collective bargaining agreement, it knew that the CBA and Stipulation mentioned in paragraph 5 (c) of the Second Consolidated Complaint had terminated on December 7, 2017 by the Court's order rejecting the same.

c. It supports IWE's position that the Board does not have jurisdiction under section 10(b) of the National Labor Relations Act (Act) as to the allegations in charge 12-CA-229342 filed by the union on October 2018 because the Union knew as of December 7, 2017 that IWE would not pay the June 2018 $0.25 wage increase due to the termination of the Stipulation that provided said wage increase.

d. It supports IWE's position that the union submitted to the exclusive jurisdiction of the Federal Bankruptcy Court the parties' obligation to bargain a new collective bargaining agreement.

e. It supports IWE's position that the rejection of a CBA is similar in its effects to a bona fide impasse.

f. It supports IWE's position that a post rejection debtor is not limited to implement only the modification proposed in their last proposal but that it may implement all the modifications proposed during the bargaining of the modifications to the collective bargaining agreement.

g. As stated previously, the March 28, 2018 Minutes support IWE's position that the Court addressed and resolved the allegations included in paragraphs 5 (c); 6 (b); 7; 9 (a) through (i); 10; 11 and 13 of the Second Consolidated Complaint and therefore the Board does not have jurisdiction as to the said matters, based on the following determination of facts and orders:

i. In the March 28, 2018 hearing the Court addressed, the following matters, including the Union's argument that the court did not reject the CBA in its entirety, but only certain sections discussed at the evidentiary hearing. IWE argued that the order rejected the CBA in its entirety.

ii. The court issued a bench ruling, summarized in pg. 3 of the March 28, 2018 Minute Entry as to the matters addressed by the court that day, which

states as follows: (pg. 3, Exhibit 3)

> "Creditor Union de Tronquistas de Puerto Rico (the "Union") filed a motion requesting the court to order the debtor to cease all illegal practices after the court granted debtor's request to reject the collective bargaining agreement ('CBA"), which order has been appealed to the First Circuit Bankruptcy Appellate Panel; to order the debtor to deduct from employees the Union dues; to order the debtor to negotiate a new CBA; and to order the debtor to become current on post-petition obligations. The Union's request is premised on the provisions of the Nation Labor Relations Act, 29 U.S.C. sec. 151, et. Seq., and the Railway Labor Act, 45 U.S.C. sec 151, et. Seq. **The Union alleges that this is a core proceeding under 28 U.S.C. sec. 157 (b) (2) (A, B, and O), and consents to the entry of a final order.** The statutory premise for the request is 11 USC sec 1113. The debtor has objected the Union's request alleging the same are premised under non-bankruptcy law. Debtor denied having engaged in any illegal practice and affirms it has never asserted that the Union does not exist. The Debtor also stated that the court granted the request to reject the CBA, and, although the order was appealed, a stay pending appeal has not been entered. The Order allowing rejecting was not subject to any condition or modification of the CBA, the same ceased to exist."

h. The March 28, 2018 Minute supports IWE's position as to the Court's Order regarding the above stated matters: (pg. 3-4, Exhibit 3)

1. The NLRB has jurisdiction to entertain unfair labor practice claims. The action is exempt from the automatic stay to the extent that the same relates to a government unit enforcing its regulatory power. **However, the NLRB may not seek to execute a money judgement (Emphasis supplied)**
2. **A review of this court's order, particular the last paragraph, show that the court rejected the CBA in its entirety. There were no qualifications, conditions or exceptions (Emphasis supplied)**.
3. The court granted the request to negotiate a new CBA, and stressed

the need to engaged in flexible negotiations, following the views and conclusions in the following law review article cited by the Union: Jacob L. Kaplan, CONSIDERING WIHCI LABOR TERMS A DEBTOR MAY IMPOSE ON ITS UNION AFTER REJECTING A COLLECTIVE BARGASINING AGREEMENT UNDER 1113, 30 Emory. Dev. J. 207 (2013). The court cited the following:

> "Courts should give debtors flexibility to impose labor terms from any pre-1113 proposal. This approach would create a consistent standard for the nonbankruptcy (sic) bargain impasse scenario and the analogous post 1113 bankruptcy scenario…"

4. The Court also held that the "request of the Debtor to become current on post petitions obligations is moot as the parties agreed the Debtor is current".

4. We request the Board to take Judicial Notice of **Section 157 (b) (1) & (2) (A, B, and O) of the US Code (28 USC sec. 157)** mentioned in the Minute of Entry which states as follows: **(Exhibit 4)**

(b) (1): Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgements subject to review under section 158 of this title (28 USC sec. 158)

(b) (2): Core proceedings include, but are not limited to-

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exceptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purpose of distribution un a case under title 11;

(O) other proceedings affecting the liquidation of the assets of the estate

or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims;

5.We request the Board to take Judicial Notice of **Section 158 of the US Code (28 US Code sec. 158),** which provides, among other matters, that the jurisdiction to review the decisions, orders or resolutions of the bankruptcy courts **(Exhibit 5)**

6. The March 28, 2018 Minute Entry supports IWE's position that pursuant to the union's consent to the entry of a **FINAL Order** under sec. 157 (b) (2) (A, B, and O) the NLRB does not have jurisdiction as to the matters resolved by the court therein, as stated in paragraph 3 of this Motion for Judicial Notice **(Exhibits 3, 4 & 5)**.

7. **Exhibit 6 - Order granting Appellee's Motion to Dismiss Appeal for Equitable Mootness issued by the First Circuit Court's Bankruptcy Appellate Panel (BAP) on July 24, 2018**:

This judicial decision support IWE's arguments as to:

i. The effectiveness on December 7, 2017 of the Opinion and Order rejecting the CBA and Stipulation mention in paragraph 5 (c) of the Second Consolidated Complaint.

ii. The extend of the court's decision rejecting the totality of the CBA and Stipulation mention in paragraph 5 (c) of the Second Consolidated Complaint.

iii. The termination as of December 7, 2017 of the provision that granted the June 2018 $0.25 wage increase mentioned in paragraph 9(g) of the Second Consolidated Complaint.

iv. The union's unclean hands and bad faith in violation of the Act throughout all the bankruptcy proceedings which continued with the filing of the charges in the Second Consolidated Complaint.

v. That the Joint Plan does not include the costs related to the CBA and Stipulation mention in paragraph 5 (c) of the Second Consolidated Complaint, including the wage increase mentioned in paragraph 9(g) of

the Second Consolidated Complaint.

vi. That the Union did not request a stay of the Confirmation of the Joint Plan pending the appeal before the BAP nor of the Opinion and Order rejecting the CBA.

vii. That the Union did not request a stay nor appealed the March 28, 2018 Minute Entry.

viii. The confirmation of the good faith efforts of IWE to bargain with the Union the propose modifications to the CBA prior to filing *Motion Requesting Rejection of the Collective Bargaining Agreement with Union de Tronquistas.*

ix. The flexibility regarding the March 28, 2018 court order to the parties to bargain the new collective bargaining agreement.

x. The precarious financial situation of IWE and the justification for the rejection of the totality of the CBA and/or propose modifications.

8. **Exhibit 7 - Joint Plan filed by IWE and approved by the Federal Bankruptcy Court for the District of Puerto Rico**: The Joint Plan supports IWE's position as to their economic commitments under the 10 years reorganization plan and/or limitations regarding the bargaining of a new collective bargaining agreement and/or any money judgement imposed by the Board to IWE.

9. **Exhibit 8 - Federal Bankruptcy Court for the District of Puerto Rico September 20, 2018 Order & related motion filed by IWE**: This judicial decision supports:

i. IWE's position as to the finality of the termination on December 7, 2017 of the totality of the CBA and Stipulation mentioned in paragraph 5(c) of the Second Consolidated Complaint;

ii. IWE's position of the termination of all of its obligations under the CBA and Stipulation mentioned in paragraph 5 (c) of the Second Consolidated Complaint, which included among other, those mentioned in paragraphs 9(a) through (i) and 13 of the Second Consolidated Complaint.

iii. It also supports IWE's position as to the lack of jurisdiction of the Board regarding the alleged union dues owed mentioned in paragraphs 9(f), 9(h), 9(i) and 13 of the Second Consolidated Complaint.

iv. Finally it supports IWE's position that as of December 7, 2019 the CBA and Stipulation mentioned in paragraph 5(c) of the Second Consolidated Complaint ceased to exist and was no longer binding on the parties, including but not limited to the June 2018 $0.25 wage increase alleged in paragraph 9(g) of the Second Consolidated Complaint.

III. CONCLUSION

We hereby request that Judicial Notice is taken from the facts and determinations issued by the Federal Bankruptcy Court for the District of Puerto Rico; the First Circuit Bankruptcy Appellate Panel and Rules 507 and 508 of the 28 US Code.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico, this 20h of February, 2019.

DA SILVEIRA LAW OFFICE LLC
Bolivia 33, Suite 203
San Juan, Puerto Rico 00917
Tel (787)274-8383
Fax. (787) 281-6689
Cel (787)562-5061

By:Yolanda M. Da Silveira Neves
Yolanda M. Da Silveira Neves
Colegiado 11148
RUA 9821
Email: ydasilveira@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this same date a true copy of this document has been send to Isabel Bordallo, Representative, Union de Tronquistas de PR, Local 901, IBT by email to tronquistalu901@gmail.com; to the Regional Director through Mrs. Garcia, Vanessa, Officer in charge of Sub-Region 24 by email to Vanessa.Garcia@nlrb.gov and to the General Counsel through Mrs. Ayesha Villegas by email at Ayesha.Villegas-Estrada@nlrb.gov

By: S/Yolanda M. Da Silveira Neves
Yolanda M. Da Silveira Neves
Attorney for Employer IWE